No. 86-1332

IN THE

Supreme Court of the United States

October Term, 1986

CARL D. McCARTY, JR.,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

Question No. 1: Did the Trial Court violate the Petitioner's constitutional protection from double jeopardy and rights of due process by increasing the sentence from two and one-half (2½) years to ten (10) years to four and one-half (4½) years to ten (10) years after the Petitioner withdrew his guilty plea and subsequently was found guilty of the identical degree of criminal homicide?

Question No. 2: Was the Petitioner's Motion for a new trial erroneously denied when the tryer of fact permitted the Commonwealth to question a recanting witness concerning the polygraph test he had taken and when the Commonwealth questioned the polygraph operator concerning the results of said test, all in violation of Petitioner's right to due process of law?

Question No. 3: Did the Trial Judge err and deny the Petitioner's constitutional right to a fair trial and due process in refusing to charge the jury on the crime of involuntary manslaughter when requested to do so by defense counsel and when evidence was presented during the course of the trial that would have supported such a finding?

Question No. 4: Was the Petitioner's right to a fair trial violated when the Trial Court refused to award the Petitioner a new trial based upon the recantation testimony of a Commonwealth witness which was the only evidence the Commonwealth presented concerning first degree murder?

Parties to the Proceeding

A list of all parties to the proceeding in the United States Supreme Court is contained in the caption of the case.

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IN THE

Supreme Court of the United States

October Term, 1986

No._____

CARL D. McCARTY, JR.,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Carl D. McCarty, Jr., prays that a Writ of Certiorari be issued to review the final Order of the Supreme Court of Pennsylvania dated October 30, 1986, which denied Petitioner's Petition For Allowance Of Appeal and affirmed the Orders of the Courts below.

I. Opinions Below

The Denial of the Supreme Court of Pennsylvania, dated October 30, 1986, unreported, appears at Appendix "A". The Judgment and Memorandum of the Superior Court of Pennsylvania, dated May 16, 1986, appears at Appendix "B". The Order and Opinion of the Court of Common Pleas of Lebanon County, Pennsylvania, Criminal Division, Action No. 759, 1982,

dated September 18, 1984, appears at Appendix "C". The Order and Opinion of the Court of Common Pleas of Lebanon County, Pennsylvania, Criminal Division, Action No. 759, 1982, dated December 12, 1984, appears at Appendix "D". The Order and Opinion of the Court of Common Pleas of Lebanon County, Pennsylvania, Criminal Division, Action No. 759, 1982, dated February 6, 1985, appears at Appendix "E".

II. Statement of Jurisdiction

The Order of the Pennsylvania Supreme Court sought to be reviewed was entered and filed on October 30, 1986. See Appendix "A", *infra*. Jurisdiction of this Court to review the Final Order of the Pennsylvania Supreme Court is conferred pursuant to 28 U.S.C. Section 1257(3).

III. Constitutional Provisions and Statutes Involved

Constitution of the United States—Amendment V:

> "Nor shall any person be subject for the same offenses to be twice put in jeopardy of life or limb."

Constitution of the United States—Amendment XIV, Section 1:

> ". . . Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws."

Constitution of Pennsylvania—Article I, Section 10:

> ". . . No person shall, for the same offense, be twice put in jeopardy of life or limb." See, Purdons Pennsylvania Statutes Annotated, Constitution, Article I.

IV. Statement of the Case

On October 5, 1982, Carl D. McCarty, Jr., Petitioner, was arrested for criminal homicide and conspiracy to commit criminal homicide. He was stopped at approximately 1:50 a.m. in the company of Petitioner's wife, Tammy McCarty, and Keith A. Bixler. The arresting officer had observed a motor vehicle weaving on the roadway and upon investigation found a pool of blood beneath the right rear fender of the automobile that had been stopped. The driver of the car, Keith A. Bixler, opened the trunk of the car and the body of Oscar Moll, III was discovered.

All three occupants of the motor vehicle were charged with criminal homicide and conspiracy to commit homicide. Tammy McCarty and Keith Bixler were charged with the additional crime of hindering apprehension or prosecution. The Honorable John A. Walter, Trial Judge, dismissed the homicide and conspiracy charge against Tammy McCarty for lack of sufficient evidence and the Lebanon County District Attorney withdrew the homicide and conspiracy charges against Keith A. Bixler.

The Petitioner was arraigned on November 16, 1982, and entered his plea of not guilty to the charge. Thereafter, on March 4, 1983, the Petitioner pleaded guilty to voluntary manslaughter in exchange for a sentence of two and one-half (2½) years to ten (10) years. Following the preparation and presentation of a presentence report he was sentenced on March 15, 1983, to a term of incarceration of two and one-half (2½) years to ten (10) years and to pay fines and costs of prosecution. The Honorable John A. Walter also ordered the Petitioner to make monthly restitution payments to the legal guardian of the victim's two (2) children until each child attained the age of eighteen (18) upon Petitioner's parole.

The youngest child of the victim was approximately two years of age and the Petitioner would have been required to make monthly restitution payments for a period of time in excess of the maximum legal sentence. *The Petitioner filed a Motion for Modification of Sentence because of the illegal nature of the restitution order only.* The Motion to Modify the Sentence was filed on March 23, 1983.

Carl M. McCarty, Jr., Petitioner, had already been transferred from the Lebanon County Correctional Facility to the State Correctional Institution and had *begun his sentence* by the date the Motion to Modify the Sentence was filed. On March 25, 1983, pursuant to the Motion to Modify the Sentence, the Honorable John A. Walter established a hearing date on the Motion to Modify the Restitution Order of the original sentence for April 15, 1983, and also *vacated the original sentence.* On April 15, 1983, the Trial Court *rejected* the plea bargain struck between the Petitioner and the Commonwealth, the two and one-half (2½) year to ten (10) years previously accepted by the Court, and granted leave to the Petitioner to withdraw his guilty plea. The plea was withdrawn on April 25, 1983.

The trial of the Petitioner began on July 18, 1983, and concluded on July 22, 1983, with a jury verdict finding the Petitioner guilty of voluntary manslaughter. The verdict of voluntary manslaughter was the same criminal offense for which the Petitioner had pleaded guilty on March 4, 1983.

The Trial Court denied Petitioner's Post Trial Motions on September 18, 1984.

On August 31, 1984, Petitioner filed an additional Post Trial Motion in Arrest of Judgment on the basis of after discovery evidence in the nature of recantation testimony

by Keith A. Bixler. Mr. Bixler, as hereinbefore stated, was arrested on October 5, 1982. Mr. Bixler testified on behalf of the Commonwealth during the trial. The recantation testimony was presented to show that the Petitioner had not made a statement to Mr. Bixler while in the Lebanon County Correctional Facility's holding cell that was sufficient to establish premeditation and therefore first degree homicide. A hearing was held on September 21, 1984, on Petitioner's new Post Trial Motions. During the course of the hearing before the Honorable John A. Walter, the Commonwealth introduced evidence, over defense counsel's objections, concerning a polygraph examination that Keith A. Bixler had taken. Petitioner filed a Brief in Support of Petitioner's Post Trial Motion arguing the recantation testimony entitled the Petitioner to a new trial and the Court committed an error by allowing witnesses to be questioned concerning the results of a polygraph test. On December 12, 1984, Petitioner's new Post Trial Motion was denied.

On January 23, 1985, the Petitioner appeared for sentencing before the Honorable John A. Walter and was ordered to pay costs, a fine and to undergo imprisonment, the minimum of which was *four and one-half (4½) years to a maximum of ten (10) years.*

As a result of the increased sentence imposed on January 23, 1985, over the sentence of March 15, 1983, the Petitioner filed a Motion to Modify Sentence on January 23, 1985. On February 6, 1985, the Petitioner's Motion for Modification was refused out of hand in accordance with an Opinion filed on said date by the Honorable John A. Walter.

An appeal was then filed to the Superior Court of Pennsylvania which affirmed the sentence of January 23, 1985. The Petitioner then filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court which was also denied. As a result, the Petitioner then filed the Petition for Writ of Certiorari to the United States Supreme Court.

V. ARGUMENT

Question No. 1: **Did the Trial Court violate the Petitioner's constitutional protection from double jeopardy and rights of due process by increasing the sentence from two and one-half (2½) years to ten (10) years to four and one-half (4½) years to ten (10) years after the Petitioner withdrew his guilty plea and subsequently was found guilty of the identical degree of criminal homicide?**

On March 15, 1983, the Petitioner was sentenced to pay the costs of prosecution, to pay a fine, to serve a term of imprisonment of not less than two and one-half (2½) years and not more than ten (10) years and to make restitution payments of Fifty Dollars ($50.00) per month to each of the victim's two (2) minor children until they reached the age of eighteen (18). This sentence was the result of a plea bargain to the crime of voluntary manslaughter and was accepted by the Court at that time. It is the Petitioner's contention that he may not be sentenced to a period of incarceration greater than that imposed on March 16, 1983. It is well established that a violation of the double jeopardy clause occurs if a sentence is increased *after* a defendant has begun serving it. *Commonwealth v. Allen*, 443 Pa. 96, 277 A2d 803 (1971); *Commonwealth v. Davy*, 218 Pa. Superior Ct. 355, 280 A2d 407 (1971); *Commonwealth v. Jackson*, 218 Pa. Superior Ct. 357, 280 A2d 407 (1971); *Commonwealth v. Unger*, Pa. Superior Ct., 462 A2d 259 (1983).

Question No. 2: **Was the Petitioner's Motion for a New Trial erroneously denied when the tryer of fact permitted the Commonwealth to question a recanting witness concerning the polygraph test he had taken and when the Commonwealth questioned the polygraph operator concerning the results of said test all in violation of Petitioner's right to due process of law?**

On August 31, 1984, Petitioner filed a Post Trial Motion in Arrest of Judgment as a result of recanting testimony by a Commonwealth witness, Keith A. Bixler. Mr. Bixler was arrested with Mr. McCarty on the morning of October 5, 1982, and originally charged with homicide, conspiracy to commit homicide and hindering apprehension. Subsequently, the District Attorney withdrew the homicide and conspiracy charge against Mr. Bixler.

Mr. Bixler testified at trial the Petitioner had told him he had, "pinched his nose shut and covered his mouth with his hand" (N.T. 240). This statement refers to the action of the Petitioner in allegedly murdering the victim. Mr. Bixler went on to testify the Petitioner told him, "this might sound crazy, but I enjoyed it" (N.T. 241).

During the recantation hearing held on September 21, 1984, before the Trial Judge, John A. Walter, Mr. Bixler testified that Mr. McCarty had never made those remarks to him (September 21, 1984, N.T. 27, 35, 39 and 40).

The District Attorney's Office, in an attempt to bolster the credibility of the initial statement made by the witness, Keith A. Bixler, to members of the Lebanon County Detective's Office on December 21, 1982, questioned Mr. Bixler during cross-examination concerning

the polygraph test he took on December 21, 1982 (September 21, 1984, N.T. 44). Petitioner's counsel objected to the question and was overruled by the Trial Judge.

Detective Paul Zechman of the Lebanon County Detective's Office was called to testify during the recantation hearing concerning the polygraph test Zechman had administered to Bixler on December 21, 1982. Again, counsel objected to that line of questioning and again the objection was overruled and Detective Zechman was allowed to relay the results of the test administered to Mr. Bixler (September 21, 1984, N.T. 76).

It is averred polygraph tests are inadmissible in the Courts of this Commonwealth. The Pennsylvania Supreme Court in the case of *Commonwealth v. Pfender*, _____ Pa.Super. _____, 412 A2d 791 (1980) was asked to decide whether a polygraph test could be admitted when both the defendant and the Commonwealth stipulated at the time of the test to its admissibility. The Court in this case concluded that, "evidence of results of the polygraph tests is not admissible in evidence even with the fact of a knowing, voluntary and intelligent stipulation that they may be submitted in evidence" (*Id.* at 412 A2d 796).

The rationale for this previous holding is set forth in the case of *Commonwealth v. Brockington*, _____ Pa. _____, 455 A2d 627 (1983). The Pennsylvania Supreme Court was urged by the appellant defendant to reject the decisional law which bars admissions of the results of polygraph examinations. The Court stated the results of the polygraph test which the defendant took were properly barred by the Trial Court since, "it is obvious

that the 'stipulation' as to admissibility did nothing to enhance the reliability of the results of the polygraph examination" (*Id.* at 455 A2d 629).

As recently as December 21, 1984, the Pennsylvania Superior Court has ruled, "when a question relating to polygraph is prompted by the prosecution and bolsters the testimony of a witness adverse to the defense, a conviction based in part on testimony mentioning the polygraph will not be permitted to stand". *Commonwealth v. York,* _____ Pa.Super. _____, 468 A2d 502 at 503.

In determining whether recantation testimony should be sufficient to arrest judgment previously rendered or to grant a new trial, the fact finder must initially decide whether the recanting testimony is true. The Petitioner avers that he was prejudiced by the admission of the polygraph results.

Petitioner filed a Brief as a result of the recantation hearing and requested a new hearing based upon the admission of polygraph evidence. That request was denied. If a conviction based in part on testimony mentioning the polygraph is not permitted to stand, the decision denying the Motion for a New Trial should not be allowed to stand.

Question No. 3: **Did the Trial Judge err and deny the Petitioner's constitutional right to a fair trial and due process in refusing to charge the jury on the crime of involuntary manslaughter when requested to do so by defense counsel and when evidence was presented during the course of the trial that would have supported such a finding?**

The Trial Judge refused to instruct the jury on involuntary manslaughter despite request by counsel because the Court felt no elements of involuntary manslaughter were present (N.T. 572 and 573). The Pennsylvania Supreme Court in *Commonwealth v. Williams*, _____ Pa. _____, 415 A2d 403 (1980) held, "... in a murder prosecution, an involuntary manslaughter charge shall be given only when requested, and where the offense has been made an issue in the case and trial evidence reasonably would support such a verdict." (*Id.* at 415 A2d 404).

18 Pa.C.S.A. 2504(a) states, "a person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person" (1972, December 6 P.L. 1482, No. 334). Because the statute presents the same test for both a lawful or unlawful act, the critical modifying language is, "in a reckless or grossly negligent manner".

All evidence throughout the trial indicated the victim entered the Petitioner's residence and initiated a fight by grabbing a knife and coming toward the Petitioner (N.T. 171, N.T. 175, N.T. 192, N.T. 222, N.T. 240, N.T. 388 to 389 and N.T. 417). After struggling with the knife, the victim picked up an eight (8) inch cast iron frying pan and attempted to strike the Petitioner on the head with

the pan (N.T. 370, N.T. 418). The Petitioner was able to block the initial blow with his right hand. His pinkie finger knuckle was broken as a result (N.T. 481, 495). The Petitioner struggled with the victim and was able to deliver an initial blow to the head of the victim with the frying pan. Detective Kim Wolfe of the North Lebanon Township Police Department testified that the Petitioner's statement given to him on October 5, 1982, was that after receiving the initial blow, the victim, "kind of got dazed a little bit" (N.T. 410). The Petitioner described the struggle in his residence and stated after receiving the first blow on the head, "the only effect I seen was he tried harder to hit me with a frying pan" (N.T. 483). In response to a question by the Trial Judge, Petitioner stated the victim was still holding the pan the second time he was struck (N.T. 483). The testimony indicates unequivocally that the victim still maintained some ability to struggle after receiving the first blow to the head and the question the jury should have been allowed to decide was whether the Petitioner acted in a reckless or grossly negligent manner by delivering a second blow to the head.

In essence, the Petitioner could have acted in a reckless or grossly negligent manner by using excessive force in delivering the second blow *or* by not realizing that the first blow was sufficient to remove the threat of physical harm to the Petitioner.

Whether the Petitioner consciously or recklessly disregarded a substantial and unjustifiable risk of excessive force or consciously or recklessly disregarded the condition of the aggressor was an issue of fact to be decided by the jury.

The victim, Oscar Moll, III, died as a result of a depressed fracture of the skull (N.T. 286) according to Lebanon County Coroner, Robert Kline, M.D., or as a result of, "Hemorrhage in and on the brain due to

tearing on the cerebral teduncles, due to depressed, comminuted fractures of the skull which were due to multiple blunt impacts to the head" (N.T. 346). This second opinion was given by Dr. Neil Hoffman of Reading, Pennsylvania, who performed the autopsy on the victim.

The Commonwealth may argue that multiple blows to the head in conjunction with the ten (10) stab wounds the victim received conclusively established lack of reckless or gross negligence on the part of the Petitioner. However, the testimony is unimpeached that the victim died as a result of the blows to the head. Further, the forensic pathologist, Dr. Neil Hoffman, testified there were no, "defensive stab wounds" (N.T. 359) exhibiting defensive reactions by the victim. The element of recklessness or gross negligence cannot be negated by the stab wounds since they were not the cause of death and the evidence indicates the blows to the head preceded the stab wounds.

It is essential therefore to concentrate the jury's attention on the brief period of time when the victim received the two (2) blows to the head. The intention and state of mind of the Petitioner at that instant was the critical determination the jury was called upon to make. By refusing to instruct the jury on the elements of involuntary manslaughter the Trial Judge precluded the jury from finding that the Petitioner was either reckless or grossly negligent in delivering the second blow with excessive force or was either grossly negligent or reckless in failing to realize that the victim was incapacitated and unable to continue to struggle after the first blow.

Wherefore, the Petitioner requests this Honorable Court to order a new trial for the Petitioner.

Question No. 4: **Was the Petitioner's right to a fair trial violated when the trial court refused to award the Petitioner a new trial based upon the recantation testimony of a Commonwealth witness which was the only evidence the Commonwealth presented concerning first degree murder?**

The Petitioner contends he is entitled to a new trial because the recantation testimony of September 21, 1984, establishes that the nature and character of the evidence illicited that day is such as a different verdict would likely result if a new trial is granted. The Courts of this Commonwealth have propounded a four step test to determine whether new evidence should afford a defendant a new trial. In the case of *Commonwealth v. Mosteller*, 446 Pa. 83, 88, 284 A.2d 786 (1971), the Supreme Court stated after-discovered evidence is a basis for a new trial if it then:

> "(1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence:
>
> (2) is not merely corroborative or cumulative;
>
> (3) will not be used solely for impeaching credibility of a witness; and
>
> (4) is of such nature and character that a different verdict will likely result if a new trial is granted."

The test enunciated in that case was accepted by the Supreme Court in the case of *Commonwealth v. Valderrama*, _____ Pa. _____, 388 A.2d 1042, 1045 (1978). It is averred that the requirements of this test have been met in this particular case by the recantation testimony of Keith A. Bixler.

The evidence could not have been obtained prior to trial. Mr. Bixler's testimony at the tial concerning the

Petitioner pinching the decedent's nose and placing his hand over decedent's mouth was discovered on December 21, 1982, when Mr. Bixler gave a statement to Detective Paul Zechman of the Lebanon County Detective Bureau. The Petitioner received a copy of the December 21, 1982, statement by Mr. Bixler as part of the discovery material supplied to him by the District Attorney's Office. Mr. Bixler's recantation testimony could not reasonably be discovered prior to the time that Mr. Bixler made known the falsity of his testimony.

The evidence of September 21, 1984, is not merely cumulative or corroborative. The Petitioner asserts that he denied the particular causation of death as described by Mr. Bixler during his testimony at his trial (See N.T. 493). There would be no need for that denial except for the fact that Mr. Bixler's testimony on this particular act established the elements of first degree murder. There was no testimony from any other source indicating that the Petitioner placed his fingers over the decedent's nose and his hand over the decedent's mouth until he stopped breathing.

During the recantation hearing on September 21, 1984, Mr. Bixler stated that Mr. McCarty never said that he enjoyed it, meaning that he enjoyed killing Mr. Noll (N.T. 27). At N.T. 35, Mr. Bixler was asked:

> "Q: Do you recall telling the District Attorney that Mr. McCarty started laughing and said, this may sound crazy, but I enjoyed it?
> A: I might have told him that, yes.
> Q: Did Mr. McCarty ever tell you that?
> A: He never said those words, no, not that I know of.

Mr. Bixler was then further asked at N.T. 39, "did you ever mean to say that Mr. McCarty pinched Mr. Moll's nose closed and put his hand over his mouth until he

stopped breathing"? Mr. Bixler replied, "Well, I really shouldn't have said that, no". Finally, Mr. Bixler was asked, "in other words, Mr. McCarty never ever actually told you that that's what happened"? Mr. Bixler replied without equivocation, "no". (N.T. 40).

On cross examination by the District Attorney's Office Mr. Bixler was asked:

> "Q: But you said Carl McCarty was, and he said that this might sound crazy, but I enjoyed it. That's what you testified to. Was that a lie?
> A: If you want to take it as a lie, I guess you could say it was.
> Q: It was not the truth? He did not say that?
> A: No."

Throughout the hearing on September 21, 1984, it is to be noted that the judge informed Mr. Bixler of his right against self-incrimination and his right to be represented by counsel (September 21, 1984, N.T. 15, 16, 17, 19, 21, 40, 47 and 55). It should also be noted that Mr. Bixler waived his right to counsel and that he was informed that his testimony at this hearing could expose him to the charge of perjury, which is a third degree felony carrying a maximum term of imprisonment of seven (7) years and a maximum fine of Fifteen Thousand Dollars ($15,000.00) (September 21, 1984, N.T. 21). Mr. Bixler finally invoked the protection of the Fifth Amendment (September 21, 1984, N.T. 55), but this invocation was after an answer by Mr. Bixler that stated, "I'm getting sick of hearing the question, so I'm just not going to answer". It is submitted that Mr. Bixler's testimony up until his invocation of the Fifth Amendment clearly indicates that he did perjure himself at the trial in Williamsport. It is further submitted that Mr. Bixler finally invoked the Fifth Amendment as a result of his frustration and impatience with the question of whether or not he told

the truth when he testified at the trial of the Petitioner. Parenthetically, the Petitioner would again point out that Mr. Bixler was advised repeatedly by the judge of his right to invoke the Fifth Amendment.

The recantation testimony of Mr. Bixler is not solely for impeaching the credibility of a witness. In fact, Mr. Bixler's testimony is the sole testimony that establishes murder in the first degree. Parenthetically, this Court's attention is directed to the closing statement of the District Attorney, wherein Mr. Feeman states:

> "This Defendant, according to the testimony of Keith Bixler, when that victim was lying in the bedroom of that apartment, placed his hand over the mouth of the victim and pinched his nose closed until the breathing of the victim stopped. First degree murder, deliberate, willful, premeditated." (N.T. 597).

The Petitioner asserts that this recantation testimony is not cumulative or corroborative of any testimony adduced at trial. Rather, it negates the evidence presented during the course of that trial by Mr. Bixler that established first degree murder.

As such, the evidence in question would likely result in a different verdict if a new trial is granted. Throughout the trial, Mr. McCarty contended that the death occurred as a result of self-defense. Mr. Bixler's testimony placed before the jury all the elements necessary to establish first degree murder. His testimony established a cold hearted premeditated design to kill a helpless person. The jury had the option of finding Mr. McCarty guilty of first degree murder, third degree murder or voluntary manslaughter. (The Trial Judge granted Petitioner's Demurrer on Second Degree.) (N.T. 438). The Petitioner avers that the jury could have reached a compromise

verdict by finding Mr. McCarty guilty of voluntary manslaughter because they felt that a first degree murder conviction, although warranted by the evidence, was not appropriate based upon the fact that the actions of the Petitioner on October 4th arose from a drug transaction that had gone sour. In essence, the jury may very well have thought that the Petitioner should be punished for committing first degree murder, but the actions, character and station of the decedent were such that it was inappropriate or unjust for them to impose such a great sanction.

It is admitted that neither the Court nor the parties associated with this trial are aware of what happened while the jury deliberated. However, the scenario as described above can and does occur in criminal proceedings. Without that testimony of first degree murder a different verdict would likely result. The Petitioner asks for a new trial so that the interests of justice are served and that the Petitioner has an opportunity to insure that a just, right and proper verdict is arrived at by the jury.

Respectfully submitted,

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APPENDIX "A"

Denial by the Supreme Court of Pennsylvania dated October 30, 1986, to Action No. 150 M.D. Allocatur Dk., 1986

SUPREME COURT OF PENNSYLVANIA
Middle District

Mildred E. Williamson
Deputy Prothonotary

434 Main Capital Building
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Harrisburg, Pennsylvania 17108
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November 3, 1986

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Re: Commonwealth v. Carl D. McCarthy, Jr., Petitioner
No. 150 M. D. Allocatur Dk., 1986

Counsel:

This is to advise that on October 30, 1986 the Supreme Court entered its Order DENYING the Petition for Allowance of Appeal filed in the above-captioned matter.

Very truly yours,

SHIRLEY BAILY
Chief Clerk

spb
cc: Thomas S. Long, Esquire
President Judge—Lebanon County
(No. 759-1982)

APPENDIX "B"

Judgment and Memorandum by the Superior Court of Pennsylvania dated May 16, 1986, to Action No. 00059 Hsbg., 1985

IN THE SUPERIOR COURT OF PENNSYLVANIA
J.75036/1985

No. 00059 Hsbg., 1985

COMMONWEALTH OF PENNSYLVANIA,

vs.

CARL D. McCARTY, JR.,

Appellant.

Appeal from the Judgment of Sentence of January 23, 1985, in the Court of Common Pleas of Lebanon County, Criminal Division, at No. 759 of 1982.

BEFORE: WIEAND, OLSZEWSKI and WATKINS, *JJ.*

PER CURIAM FILED: MAY 16, 1986

Judgment of sentence affirmed.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the Judgment of the Court of Common Pleas of Lebanon County is affirmed.

MILDRED E. WILLIAMSON
Deputy Prothonotary

Dated: May 16, 1986

Appendix "B"—Judgment and Memorandum by the Superior Court of Pennsylvania dated May 16, 1986, to Action No. 00059 Hsbg., 1985.

IN THE SUPERIOR COURT OF PENNSYLVANIA
J.75036/1985

No. 00059 Hsbg., 1985

COMMONWEALTH OF PENNSYLVANIA,

vs.

CARL D. McCARTY, JR.,

Appellant.

Appeal from the Judgment of Sentence of January 23, 1985, in the Court of Common Pleas of Lebanon County, Criminal Division, at No. 759 of 1982.

BEFORE: WIEAND, OLSZEWSKI and WATKINS, *JJ.*

MEMORANDUM FILED: MAY 16, 1986

This is an appeal from the Judgment of Sentence entered January 23, 1985, in the Court of Common Pleas of Lebanon County sentencing appellant to a term of imprisonment of not less than four and one-half (4½) nor more than ten (10) years.

On October 5, 1982, Carl D. McCarty, Jr., appellant, was arrested on charges of criminal homicide and conspiracy to commit criminal homicide. Appellant pled guilty to voluntary manslaughter on March 4, 1983, in

Appendix "B"—Judgment and Memorandum by the Superior Court of Pennsylvania dated May 16, 1986, to Action No. 00059 Hsbg., 1985.

exchange for a sentence of two and one-half to ten years. On March 15, 1983, appellant was sentenced to a term of imprisonment of two and one-half to ten years and to pay fines and costs of prosecution. The Honorable John A. Walter also ordered the appellant to make monthly restitution payments to the legal guardian of the victim's two children until each child attained the age of eighteen upon his parole. On March 23, 1983, appellant filed a motion to Modify the Sentence. On March 25, 1983, pursuant to the Motion to Modify Sentence, Judge Walter established a hearing date on the Motion to Modify the Restitution Order of the original sentence for April 15, 1983, and also vacated the original sentence. On April 15, 1983, the court below rejected the plea bargain struck between appellant and the Commonwealth and granted leave to appellant to withdraw his guilty plea. The plea was withdrawn on April 25, 1983, and a Motion for change of Venue was filed on April 29, 1983. On May 3, 1983, the court below granted the Motion and by Order dated May 16, 1983, then Chief Justice Roberts of the Pennsylvania Supreme Court transferred the case to Lycoming County.

Appellant's trial began on July 18, 1983, and concluded on July 22, 1983, with a jury verdict finding the appellant guilty of voluntary manslaughter.

Post-trial motions were filed on August 1, 1983, which were denied by the Court *en banc* on September 18, 1984. On August 31, 1984, appellant filed an additional post-trial motion in arrest of judgment on the basis of after-discovered evidence in the nature of recantation testimony by Keith A. Bixler. A hearing was held on September 21, 1984, on appellant's new post-trial

Appendix "B"—Judgment and Memorandum by the Superior Court of Pennsylvania dated May 16, 1986, to Action No. 00059 Hsbg., 1985.

motions. On December 12, 1984, appellant's new post-trial motion was denied.

On January 23, 1985 appellant was ordered to pay costs, a fine and to undergo imprisonment of four and one-half (4½) to ten (10) years. Appellant filed Motion to Modify Sentence on January 23, 1985 which was denied February 6, 1985.

Appellant presents the following questions for our consideration:

1. Did the trial court err when it refused to award a new trial based upon recantation testimony of Keith Bixler?

2. Did the trial court err when, during the post-trial hearing on after-discovered evidence, the Commonwealth was permitted to question Bixler regarding the results of a polygraph test?

3. Did the trial court err when it refused to consider boiler plate motions in arrest of judgment and for a new trial based respectively on the sufficiency and weight of the evidence?

4. Was it a violation of double jeopardy and due process of law to increase the sentence after appellant had been found guilty of voluntary manslaughter by a jury?

5. Did the trial court err in refusing a requested jury instruction on the offense of involuntary manslaughter?

Appendix "B"—Judgment and Memorandum by the Superior Court of Pennsylvania dated May 16, 1986, to Action No. 00059 Hsbg., 1985.

6. Did the trial court commit error when it refused to allow a defense witness to testify that the victim had previously made a threat to a third person that he would "blow away" people who owed him money where such threat was not communicated to the appellant?

The opinions of Judge Walter dated September 18, 1984, December 12, 1984 and February 6, 1985 have adequately disposed of the questions raised in this appeal.

Judgment of sentence affirmed.

APPENDIX "C"

Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated September 18, 1984, to Action No. 759, 1982

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IN THE COURT OF COMMON PLEAS OF
LEBANON COUNTY, PENNSYLVANIA

CRIMINAL
ACTION NO. 759, 1982

COMMONWEALTH OF PENNSYLVANIA,

vs.

CARL D. McCARTY, JR.

ORDER OF COURT

AND NOW, to wit, this 18th day of September, A.D., 1984, for reasons set forth in the accompanying Opinion, the Defendant's Post Trial Motions are denied, and the Defendant is ordered to appear before us for sentencing on the 9th day of October, A.D., 1984, at 9:00 o'clock A.M. A presentence investigation and report to the Court is hereby ordered.

BY THE COURT,

JOHN WALTER, *J.*
John Walter
ROBERT J. EBY, *J.*
Robert J. Eby

Appendix "C"—Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated September 18, 1984, to Action No. 759, 1982.

IN THE COURT OF COMMON PLEAS OF
LEBANON COUNTY, PENNSYLVANIA

CRIMINAL
ACTION NO. 759, 1982

COMMONWEALTH OF PENNSYLVANIA,

vs.

CARL D. McCARTY, JR.

APPEARANCES:

ROBERT W. FEEMAN, ESQUIRE
District Attorney
and For Commonwealth
JOHN E. FEATHER, JR., ESQUIRE
Assistant District Attorney

DANIEL EHRGOOD, ESQUIRE For Defendant
Ehrgood Associates, P.C.

OPINION, WALTER, J., FOR THE COURT ENBANC, SEPTEMBER 18, A.D., 1984

Defendant was convicted of voluntary manslaughter after a jury trial held July 18-22, 1983. He timely filed Post-trial Motions In Arrest of Judgment and For New Trial which are presently before the court for disposition.

Appendix "C"—Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated September 18, 1984, to Action No. 759, 1982.

After careful review of the trial transcripts and the briefs filed by the parties, who eschewed oral argument, we hold that the Post Trial Motions are without merit and (words illegible) denied.

The factual history of this case is as follows. Defendant was charged with criminal homicide in the October 4, 1982 death of Oscar "Ozzie" Moll, III. Moll was killed while in the Defendant's apartment during a fight over drug money allegedly owed to Moll by the Defendant. The victim was killed by a severe blow to the head with a cast iron frying pan and suffered numerous stab wounds as well. The Defendant was arrested in the act of transporting the body in the trunk of a friend's car. The driver of the car, Keith Bixler, and the Defendant's wife who was in the car were also arrested. Defendant initially accepted a plea bargain and pleaded guilty to voluntary manslaughter but later withdrew his plea for reasons not important here.

The case received much publicity and the defense's motion for a change of venue was granted. The trial was held in Lycoming County presided over by Lebanon County Common Pleas Judge John Walter who had previously handled the March 15, 1983 sentencing and subsequent withdrawal of the plea in April 1983.

We will quickly dispose of Defendant's Motion in Arrest of Judgment. Defendant's Motion is a bare allegation: "The evidence was insufficient to sustain the judgment". No additional reasons in support of this contention were filed after the transcript of trial were filed. This Motion is merely boiler plate language and is

Appendix "C"—Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated September 18, 1984, to Action No. 759, 1982.

therefore deemed waived for purposes of review. Pennsylvania appellate courts have been strictly enforcing Pa.R.Crim.Pro. 1123(a) and demanding specific, written motions to support Post Trial Motions: . . . "This Court has repeatedly held that boiler plate post-verdict motions will not preserve allegations for appellate review". *Commonwealth v. Pronkoskie*, 498 Pa. 245, 253, 445 A.2d 1203, 1207, (1982). *See also Commonwealth Philpot*, 491 Pa. 598, 421 A.2d 1046 (1981); *Commonwealth v. Gamble*, 585 Pa. 418, 402 A.2d 1032 (1979); *Commonwealth v. Waters*, 477 Pa. 430, 384 A.2d 234 (1978). The Motion in Arrest of Judgment is therefore denied.

Defendant has presented five reasons in support of his Motion for New Trial. The first and second reasons again allege boiler plate language, to wit: 1) The verdict was against the evidence and 2) The verdict was against the weight of the evidence. These two assertions are not sufficient to preserve review and are deemed waived as explained above.

The third reason asserted for a new trial is that the trial judge erroneously refused to recuse himself despite Defendant's Pre-Trial Motion requesting recusal. At the Pre-Trial hearing, Defendant's counsel urged the trial judge to recuse to "avoid the appearance of impropriety" (N.T. 8-9, 5/3/83). Counsel stated his request stemmed from "an abundance of caution." (N.T. 9, 5/3/83) because of the publicity and community pressure generated by the case.

Appendix "C"—Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated September 18, 1984, to Action No. 759, 1982.

We must note that this issue was not addressed in Defendant's brief. At the Pre-Trial hearing the trial judge explained clearly and succinctly that he would be impartial. He stated that he had recused himself in past cases where his emotional involvement placed his impartiality in doubt, but believed this trial presented no problems to his judicial experience. It is well settled that the Defendant has the burden of proving bias, prejudice or unfairness, necessitating recusal, none of which exist here. See *Commonwealth v. Darush*, 279 Pa. Super. 140, 420 A.2d 1071 (1980). (examples of when recusal proper). This contention is without merit.

The fourth reason supporting the Motion is the trial judge's "improper denial of Defendant's request to charge jury on involuntary manslaughter". A charge of involuntary manslaughter will be given to a jury in a murder trial only when requested by the defense and where the offense has been made an issue in the case and the *trial evidence reasonably supports such a verdict. Commonwealth v. Williams*, 490 Pa. 187, 190, 415 A.2d 403, 404 (1980) (emphasis added). In the instant case the defense counsel requested a charge of involuntary manslaughter but the court ruled that no evidence was presented to support the charge. A review of the trial record demonstrates that this ruling was correct. The defense relied on justified self-defense. No evidence was presented indicating that the Defendant acted in a "reckless or grossly negligent manner" as involuntary manslaughter is defined in 18 Pa.C.S.A. 2504(a). The charge was properly refused.

Appendix "C"—Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated September 18, 1984, to Action No. 759, 1982.

The fifth and final reason adduced by Defendant is the Court's refusal to allow defense testimony by Henry Klahr. During the trial the defense counsel became aware that Klahr would testify to an uncommunicated threat made against the Defendant by Moll (N.T. 271, (line illegible) victim as the aggressor to bolster the self-defense claim. *Commonwealth v. Peronace*, 328 Pa. 86, 195 A.57 (1937). The Court was concerned that this offered testimony would be cumulative of corroborative evidence. The final offer of proof on Klahr rendered the debate moot because his testimony was too indefinite as to the time of threat and persons' threatened. The threat was overheard by Klahr when Moll borrowed his telephone one or two weeks before Moll's death. The proposed witness heard Moll say: "I'm going to blow them away" (N.T. 563, 7/21/83). When Clair (*sic*) asked who Moll referred to, Moll replied: "Those people down in my apartment". *Id.* The Court ruled that with twenty apartments in Moll's building, he would not let the jury speculate on the unnamed subjects of the threat. (N.T. 564, 7/21/83). The indefinite nature of the proffered testimony rendered it irrelevant and immaterial, and the Court correctly excluded it.

Defendant's Post Trial Motions will be accordingly denied.

APPENDIX "D"

Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated December 12, 1984, to Action No. 759, 1982

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IN THE COURT OF COMMON PLEAS OF
LEBANON COUNTY, PENNSYLVANIA

CRIMINAL
ACTION NO. 759, 1982

COMMONWEALTH OF PENNSYLVANIA,

vs.

CARL D. McCARTY, JR.

ORDER OF COURT

AND NOW, to wit, this 12th day of December, A.D., 1984, upon due consideration, Defendant's Post-Verdict Motions are denied for reasons set forth in the accompanying Opinion. Defendant is ordered to appear for sentencing on January 9, A.D., 1985, at 8:30 A.M. in Courtroom No. 2.

BY THE COURT,

JOHN WALTER, *J.*
John Walter
ROBERT J. EBY, *J.*
Robert J. Eby

Appendix "D"—Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated December 12, 1984, to Action No. 759, 1982.

IN THE COURT OF COMMON PLEAS OF
LEBANON COUNTY, PENNSYLVANIA

CRIMINAL
ACTION NO. 759, 1982

COMMONWEALTH OF PENNSYLVANIA,

vs.

CARL D. McCARTY, JR.

APPEARANCES:

ROBERT W. FEEMAN, ESQUIRE
District Attorney and
JOHN E. FEATHER, JR., ESQUIRE
Assistant District Attorney
For Commonwealth of Pennsylvania

DANIEL EHRGOOD, ESQUIRE FOR DEFENDANT

OPINION, WALTER, J., FOR THE COURT EN BANC, DECEMBER 12, A.D., 1984

Before us is the defendant's post-verdict motion seeking a new trial based upon after-discovered evidence in the form of recantation testimony. A hearing on the allegations was held on September 21, 1984, where the Commonwealth's witness, Keith A. Bixler, recanted part of his trial testimony. Briefs were submitted and on

Appendix "D"—Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated December 12, 1984, to Action No. 759, 1982.

November 21, 1984, oral arguments were heard on the request for a new trial and the defendant's additional motion for a new recantation hearing. We are now prepared to dispose of both motions.

Defendant was charged with criminal homicide in the death of Oscar "Ozzie" Moll, III. Briefly, the victim arrived at Defendant's apartment during the early evening of October 4, 1981 and was killed by the defendant in an ensuing fight, by blows to the head with a frying pan and stab wounds. Defendant sought assistance with disposing of the body and later that night persuaded Bixler to help him. Defendant, his wife, and Bixler were apprehended while riding in Bixler's mother's car during the early morning hours of October 5, 1981; the victim's body was discovered in the car's trunk.

Defendant's jury trial was held July 18-22, 1983 in Lycoming County due to heavy pre-trial publicity in Lebanon County. At trial, Defendant presented his case of justified killing in self defense. The jury returned a verdict of voluntary manslaughter. We denied Defendant's initial post-verdict motions in an Opinion and Order dated September 18, 1984. However, on September 4, 1984, we granted Defendant a hearing on his supplemental post-vedict motion alleging recantation of trial testimony by Bixler, discovered on August 24, 1984.

At trial, Bixler testified concerning a conversation that occurred in the Lebanon County Prison around 8 or 9 A.M. on October 5, 1981, when Bixler and the defendant

were alone in the holding cell. At that time, according to Bixler, the defendant told him about the killing again and admitted hitting Moll on the head with a frying pan and stabbing Moll with a knife. The defendant explained to Bixler that Moll fell to the floor and was "convulsing or something, you know, flopping around like, and he [McCarty] heard gurgling like." (N.T. 240). Bixler then testified as follows:

> a. He told me that he bent down over him to listen if he could hear any breathing or not. He said he pinched his nose shut and covered his mouth with his hand.
>
> Q. Who told you he did that to Oscar Moll?
>
> A. Carl McCarty.
>
> Q. Carl McCarty, this defendant, told you he put his hand over Oscar Moll's nose until he stopped breathing?
>
> A. He said over his mouth and pinched his nose shut. (N.T. 240).

Bixler further stated that after making these remarks the defendant started laughing and said, "This might sound crazy, but I enjoyed it" (N.T. 241), which Bixler believed referred to the murder (N.T. 242). This testimony constituted the only evidence of first degree murder presented at trial.

On cross-examination, defense counsel attempted to counter Bixler's version of the conversation by asking Bixler whether the defendant ever indicated he tried to *revive* Moll (N.T. 267). Later in the trial, the defendant himself testified that he attempted to resuscitate Moll (N.T. 484-88).

Appendix "D"—Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated December 12, 1984, to Action No. 759, 1982.

At the recantation hearing the court advised Bixler several times that his testimony could lead to perjury charges and that he could invoke his Fifth Amendment right against self incrimination. Aware of the penalties for perjury, Bixler gave a different version of the October 5, 1981 holding cell conversation. He testified the defendant said that while Moll lay on the floor, he [McCarty] got down and pinched Moll's nose shut and put his hands in or at Moll's mouth (1984 N.T. 24). The defendant never said why he did this because he began laughing and was removed from the cell by a guard (1984 N.T. 34). Bixler repudiated his trial testimony concerning the defendant's alleged suffocation of Moll (1984 N.T. 39).

Bixler also recanted trial testimony regarding the defendant's statement that he enjoyed killing, by now claiming the defendant never made such a comment (1984 N.T. 35). According to Bixler, he interpreted Defendant's laughter to mean enjoyment, but looking back, he realizes Defendant's laughter was a release of emotional pressure (1984 N.T. 25-27). In fact, according to his recantation testimony, Bixler told the District Attorney his "impressions", instead of reporting actual "conversations" (1984 N.T. 42). He had hoped to receive lenient treatment by his cooperation (1984 N.T. 36).

Defendant contends the recanted testimony requires a new trial. He believes the jury reached a compromise verdict after being charged by the judge on first degree murder through voluntary manslaughter. Further, with the first degree evidence recanted by Bixler removed, a different verdict will likely result. The Commonwealth

argues that the recanting testimony is unbelievable and incredible and should be completely disregarded. If accepted as true, the Commonwealth asserts the same verdict would result, so a new trial is not warranted.

Both sides agree *Commonwealth v. Mosteller*, 446 Pa. 83, 88, 284 A.2d 786, 788 (1971) sets forth the rule for evaluating whether or not a new trial should be granted in light of after-discovered evidence. Such evidence satisfies *Mosteller's* four prong test and results in a new trial where:

> ". . . the evidence in question (1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely for impeaching the credibility of a witness; and (4) is of such nature and character that a different verdict will likely result if a new trial is granted." *Commonwealth v. Coleman*, 438 Pa. 373, 376-77, 264 A.2d 649, 651 (1970).

Clearly the recanted testimony satisfies the first element since defense counsel became aware of Bixler's changed story in August 1984. The second element is also met since Bixler's trial testimony, and the recantation thereof, pertains to a conversation involving only the defendant and himself, and brought in the sole evidence of first degree murder. Defendant points out that element three could never be met because recanting will always impeach the credibility of the recanting witness. We think this is too narrow a view and the third prong refers to evidence that would be used solely to impeach *another* witness. Since this testimony will serve

to remove all evidence of first degree murder, and will not be used solely for impeachment purposes, we find element three is met.

The Defendant places the most emphasis on the fourth element and vigorously claims a different verdict will likely result, because diferent grounds for compromise will be available to the jury. However, we believe the motion can be decided without resort to *Mosteller* based on Bixler's credibility.

In reviewing this motion, we must first decide whether the recanting testimony is true. Quite frankly, we agree with the Commonwealth and those cases that categorize recantation testimony as extremely unreliable: *Commonwealth v. Osborn*, 223 Pa.Super. 523, 524, 302 A.2d 395, 396 (1973); *Commonwealth v. Sholder*, 201 Pa.Super. 642, 645, 193 A.2d 632, 633 (1963); *Commonwealth v. Scull*, 200 Pa.Super. 122, 130, 186 A.2d 854, 858 (1962). No new trial will be granted when the court is not satisfied the recanting testimony is true.

At oral argument the Defendant tried to improve Bixler's credibility by contrasting the inherent unreliability of a "jail house confession" with the perceived unreliability of a recantation. He argued that the latter is actually *more* reliable since made with the knowledge the recanting witness faces a possible perjury conviction. The "jail house confession" used at trial was related to the District Attorney by a "co-defendant"[1] and was related to advance the "co-

[1] Bixler was initially charged with criminal homicide but the charge was dropped and he faced the remaining charges of hindering apprehension and conspiracy. He was not a co-defendant in the literal sense.

defendant's" best interests (to cooperate with the authorities). Therefore the recanting testimony, a declaration *against* Bixler's interests, should be accorded more credibility than the previous self-serving statement.

Although we understand and appreciate Defendant's distinction between Bixler's two versions, and although we also wonder about the motives for Bixler to subject himself to perjury prosecution, we are not convinced the recanting testimony offered on September 21, 1984 is true. First, Bixler's credibility is low, due to his admitted perjury, his criminal record, general demeanor and evasive answers. Second, his *trial* testimony was bolstered by the testimony of his attorney and the District Attorney at the September 21, 1984 hearing, who recalled that Bixler's story remained unchanged throughout questioning from October 15, 1981 until August 21, 1984 (N.T. 61, 87-88). Third, we find it suspicious the urge to recant appeared shortly after Bixler and McCarty were imprisoned together and had daily opportunities to converse. Fourth, we doubt Bixler possessed the legal savvy to consciously concoct trial testimony, and tailor it for a first degree murder charge, to impress the prosecutors and gain some advantge with his cooperation. And fifth, part of the trial testimony was somewhat corroborated by another Commonwealth witness[2].

[2] Commonwealth trial witness Mark Godfrey testified the Defendant said "it scared him because he liked it." (N.T. 196) meaning the Defendant enjoyed killing Moll. While this admission was made during the night of October 4, 1981 while McCarty, his wife, Bixler and Godfrey walked to Godfrey's apartment to drink beer, not in the hold cell, it corroborates McCarty's state of mind.

Appendix "D"—Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated December 12, 1984, to Action No. 759, 1982.

Even if we believed the recantation testimony, we do not agree with the Defendant that a new verdict would likely result. We remain convinced the verdict of voluntary manslaughter was correct in this case. In our opinion, the verdict was in line with the facts presented and was *not* the result of compromise. As the Commonwealth points out, a compromise between first degree murder and voluntary manslaughter would logically be third degree murder. It appears the jury did not believe Bixler's testimony about pinching the victim's nose shut, otherwise a higher degree of murder would have been found.

Turning to the second issue, we refuse to grant a new recantation hearing. We are constrained to agree that polygraph test evidence should not have been admitted at the September 21, 1984 hearing because our appellate courts are not yet convinced of its probative value.[3] *See e.g. Commonwealth v. Brockington,* 500 Pa. 216, 455 A.2d 627 (1983).

However, admission in this case was not so prejudicial to the Defendant that another hearing is necessary. We have disregarded the testimony admitted in error in reaching our decision, and relied on the remaining evidence, which we believe overwhelmingly supports the denial of a new trial.

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[3] Some scientists equate its value as equal to, if not better than, reading tea leaves.

APPENDIX "E"

Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated February 6, 1985, to Action No. 759, 1982

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IN THE COURT OF COMMON PLEAS OF
LEBANON COUNTY, PENNSYLVANIA

CRIMINAL
ACTION NO. 759, 1982

Defendant's Motion for Modification of Sentence

COMMONWEALTH OF PENNSYLVANIA,

vs.

CARL D. McCARTY, JR.

ORDER OF COURT

AND NOW, to wit, this 6th day of February, A.D., 1985, for the reasons set forth in the accompanying Memorandum Opinion, Defendant's Motion for Modification of Sentence is refused out of hand.

BY THE COURT,

JOHN WALTER, *J.*
John Walter

JW/rsc

Appendix "E"—Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated February 6, 1985, to Action No. 759, 1982.

IN THE COURT OF COMMON PLEAS OF
LEBANON COUNTY, PENNSYLVANIA

CRIMINAL
ACTION NO. 759, 1982

Defendant's Motion for Modification of Sentence

COMMONWEALTH OF PENNSYLVANIA,

vs.

CARL D. McCARTY, JR.

APPEARANCES:

ROBERT W. FEEMAN, ESQUIRE For Commonwealth
District Attorney

DANIEL EHRGOOD, ESQUIRE For Defendant

MEMORANDUM OPINION, WALTER, J.,
FEBRUARY 6, A.D., 1985

Defendant is seeking a hearing on his Motion for Modification of Sentence, alleging the sentence imposed on January 23, 1985 violates the constitutional prohibition against double jeopardy. We will deny this motion without a hearing for the reasons set forth below.

Defendant was charged with homicide on October 5, 1982. A plea bargain was negotiated, and on March 4, 1983 the defendant entered a guilty plea to the charge of

voluntary manslaughter. On March 16, 1983 Defendant was sentenced to a term of imprisonment of 2½ to 10 years pursuant to the terms of the plea bargain and ordered to make restitution payments of $50.00 per month to each of the victim's two children until they reached age eighteen. The restitution element was added by this court, which was most reluctant to accept the bargain without it.

Defendant challenged the restitution portion of the sentence by filing a Motion to Modify Sentence on March 25, 1983. Recognizing time constraints for appeal purposes, the court vacated the original sentence and scheduled a hearing on the motion for April 15, 1983. At the hearing, the court conceded the illegality of the restitution order but indicated the 2½ to 10 year plea bargain was unacceptable without it and would be refused. The defendant was granted leave to withdraw his plea on April 25, 1983 in the face of imminent rejection of the plea bargain by the court per Pa.R.Crim.P. 319 (b).

Defendant proceeded to a jury trial conducted July 18-22, 1983 where he was found guilty of voluntary manslaughter. His post trial motions denied, he appeared for sentencing on January 23, 1985. The court imposed a sentence of 4½ to 10 years, but extended credit to the defendant for the 23 months he already served.

The 5th Amendment prohibition against double jeopardy applies to Pennsylvania via the 14th Amendment. *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed. 2d 707, 89 S.Ct. 2056 (1969). The double jeopardy prohibition prevents a second prosecution for the same

offense both after acquittal and after conviction. It also prohibits multiple punishments for the same offense. *Commonwealth v. Henderson*, 482 Pa. 359, 368, 393 A.2d 1146, 1151 (1978). While it is clear from Pennsylvania case law that a court may not unilaterally increase an existing sentence once imposed, even to correct a mistake, it is equally clear that:

> In that category of cases, which our decisions have characterized as an increase over the original sentence following retrial secured at the defendant's behest, there has been a general recognition that the United States Supreme Court decision in *Pearce* is controlling and that double jeopardy does not bar a more severe sentence being imposed after the second trial, (citations omitted). *Commonwealth v. Henderson, supra* 482 Pa. at 373, 393 A.2d at 1153-54. (For *Pearce*, see infra).

We interpret Defendant's double jeopardy claim to allege that the court cannot impose a harsher sentence after trial than would have been imposed pursuant to the aborted plea bargain. We disagree and hold our sentence is legal and proper under the sentencing guidelines which would here permit a sentence of 5 to 10 years. Further, we placed our explanation for the increased severity on the record as required by *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed. 2d 656, 89 S.Ct. 2072 (1969) and *Commonwealth v. Riggins*, 474 Pa. 115, 377 A.2d 140 (1977).

The *Pearce* case controls this situation. *Pearce* dealt with the imposition of a more severe sentence upon reconviction after a new trial and held that neither

Appendix "E"—Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated February 6, 1985, to Action No. 759, 1982.

double jeopardy nor the Equal Protection Clause implies (words illegible). However, the Supreme Court recognized that the possibility of judicial vindictiveness in resentencing could chill a defendant's right to appeal. To guard against vindictive punishment, courts were directed to include a written explanation for the greater sentence based on objective information concerning identifiable conduct by the defendant since the time of the original sentencing. *Pearce* also held that credit must be given for the time served under the prior sentence to prevent the double jeopardy claim of multiple punishments for the same offense.

Pa.R.Crim.P. 1100's Note states that "[w]ithdrawal, rejection of, or a successful challenge to a guilty plea shall be considered the granting of a new trial for purposes of this rule." We consider the withdrawal of Defendant's plea equivalent to the granting of a new trial and find that *Pearce* controls.

The reasons articulated at the sentencing hearing justify the increased 4½ year minimum. Between the original sentencing and the January 23, 1985 sentencing, Defendant spent time in the Lebanon County Prison. His disruptive behavior there resulted in five lock-ups for disciplinary reasons. This fact is of sufficient weight to justify an additional two years on the minimum sentence. See *Commonwealth v. Sinwell*, 223 Pa.Super. 544, 302 A.2d 400 (1973) (prison breach between time of original and subsequent sentencing justified increased sentence).

Appendix "E"—Order of Court and Opinion by the Court of Common Pleas of Lebanon County dated February 6, 1985, to Action No. 759, 1982.

Defendant's double jeopardy contention falls on a second prior to his trial. "The effect of the order was to restore relator to the status of an unsentenced defendant convicted of crime. By revocation the previous sentence was expunged and ceased to exist as though never imposed." *Commonwealth ex rel. Champion v. Claudy*, 171 *Pa. Super.* 143, 145, 90 A.2d 638, 639 (1952), quoted with approval in *Commonwealth v. Colding*, 482 Pa. 112, 119, 393 A.2d 404, 408 (1978). It is logically impossible to use a vacated sentence, which no longer exists, as a benchmark measurement for a subsequent sentence. The vacated sentence has no legal effect and cannot support a double jeopardy claim.

In conclusion, the voluntary withdrawal of the guilty plea subjected Defendant to all the risks and possible repercussions of trial, including a different sentence. The January 23rd sentence is 6 months *less* than the legal maximum, mainly due to defense counsel's ardent presentation at the hearing. We granted credit for time served and placed on record the conduct of defendant that led to the sentence imposed.

The effect of the procedural history is that there is only *one* sentence on record from January 23, 1985. Therefore, we see no merit to Defendant's double jeopardy contention. No hearing on the claim is warranted; the motion will be denied.